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Opinion on remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EVARISTO TOSCANO, Defendant and Appellant.	A137606 (Alameda County Super. Ct. No. 166269)

Evaristo Toscano was convicted of second degree murder after he shot and killed a man in retaliation for a fight over graffiti tagging. He appealed, and we concluded in an unpublished opinion that the trial court erred in admitting double hearsay testimony but that the error was harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Toscano* (Dec. 16, 2015, A137606) (*Toscano I*).) The Supreme Court granted Toscano's petition for review and then remanded to this court after it decided *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which reversed a gang enhancement because of erroneously admitted hearsay evidence. The parties have submitted supplemental briefs on the question of whether *Sanchez* compels reversal of Toscano's conviction because the erroneously admitted double hearsay violated Toscano's rights under the confrontation clause contained in the Sixth Amendment to the United States Constitution. We conclude that the double hearsay violated the confrontation clause but that the error was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). We therefore again affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In *Toscano I*, we discussed the events leading to Toscano's murder conviction and we briefly summarize them here. On the night of June 11, 2010, four young male relatives—Adham, Awad, Samey, and Samier[1]—were working at an older relative's discount store in East Oakland. As they were cleaning the store after it closed at 10:00 p.m., Samey and Adham walked outside and saw two male teenagers, who were about three or four years apart, spray painting graffiti on a white truck in the parking lot. Adham slammed the gate of the parking lot to get the teenagers' attention, at which point the older teenager sprayed paint on Adham's arm. Adham recognized the older teenager from the neighborhood, and he retaliated by hitting the teenager in the face, knocking him to the ground. Adham then grabbed the teenager's bottle of paint and sprayed one or both teenagers. Samey told the two teenagers to leave, and they did. The older teenager left a phone at the scene, however, and he returned to ask for it back. Samey threw the phone across the street so that the teenager had to retrieve it. The teenager left again, and the four relatives continued to clean the store.

The four finished cleaning, locked the store, and were ready to leave. Before they left, they saw four men walking toward them. One of the men (a "chubby guy" later identified as Hector Vilchis, who was dating the cousin of the younger graffiti tagger) kicked the white van in the parking lot. Adham saw a tall and thin Hispanic man (later identified as Toscano, who was dating the sister of the younger graffiti tagger) lift a gun, and Adham and Samey ran while Awad "ducked down." Samier tried to talk with Toscano, but Toscano fired several shots, hitting Samier. Samier died at the scene from a gunshot wound to his chest.

[1] Awad, Samey, and Samier were brothers, and Adham was their cousin. The four share the last name Ayesh. In the interest of clarity, we use their first names when referring to them individually.

Police arrested Toscano more than eight months later. On the day of the arrest, Sgt. Sean Fleming interviewed the older graffiti tagger. At trial, the prosecutor asked Fleming what he had learned in this interview, and Toscano objected on hearsay grounds. The trial court agreed that the question called for hearsay and asked the prosecutor if the information was being offered for the truth of the matter asserted. The prosecutor said it was not, and he stated that the testimony would be offered to explain the officer's subsequent conduct. The court then instructed the jury that "the hearsay is not for the truth, but is to show you what this officer, the sergeant, did subsequently in his investigation."

Sgt. Fleming then testified that the older graffiti tagger told him about a "text conversation" he had with the younger graffiti tagger. When the officer was asked about the contents of the conversation, Toscano again objected on hearsay grounds, maintaining that the question called for "double hearsay." The trial court again overruled the objection, ruling that the testimony was not being offered for the truth of the matter asserted. Sgt. Fleming proceeded to explain that the older graffiti tagger said that the younger tagger had sent him a text saying it was Toscano who "went over to [the murder scene] and was shooting." Sgt. Fleming testified that he did not necessarily believe the statement, and explained that he was unable to retrieve any evidence of the text because it had been sent so long ago. The younger graffiti tagger testified at trial but denied text messaging the older tagger about the crime. The older graffiti tagger did not testify at trial.

Toscano and Vilchis were tried together. During jury deliberations, jurors sent a note to the court asking whether they could use information from the text conversation to determine whether Vilchis was present at the time of the shooting. The court responded that the text conversation "was allowed in only for the purpose of showing you why Sgt. Fleming did what he did in this investigation. It was not admitted for the truth of the conversation."

The jury convicted Toscano of second degree murder (Pen. Code, § 187, subd. (a))[2] and found true allegations that he: (1) personally and intentionally discharged a firearm and caused great bodily injury or death (§§ 12022.7, subd. (a), 12022.53, subd. (d)), (2) personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and (3) personally used a firearm within the meaning of sections 12022.5, subdivision (a) and 12022.53, subdivision (b). The jury also convicted Toscano of three counts of attempted murder (§§ 187, subd. (a), 664), with true findings on allegations that he: (1) personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), (2) personally used a firearm within the meaning of section 12022.53, subdivision (b), and (3) personally used a firearm within the meaning of section 12022.5, subdivision (a). As to Vilchis, the trial court declared a mistrial after jurors were unable to reach a verdict as to him.

The trial court sentenced Toscano to an indeterminate term of 40 years to life and a determinate term of 47 years, to be served consecutively. In Toscano's first appeal, he argued that (1) material evidence was not preserved, (2) a pretrial statement he made implicating codefendant Vilchis was improperly redacted and he was wrongly tried with Vilchis, and (3) the trial court improperly questioned and commented on the testimony of a memory expert. This court rejected those arguments, and they are no longer at issue.

Toscano also argued that the trial court erred in admitting Sgt. Fleming's testimony about the text conversation between the two graffiti taggers. Rejecting the trial court's reasoning that the testimony was admissible as nonhearsay to explain the officer's subsequent conduct, we concluded that the testimony was admitted in error. "A hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is *relevant* to an issue in dispute." (*People v. Armendariz* (1984) 37 Cal.3d 573, 585, italics added; see also *People v. Scalzi* (1981) 126 Cal.App.3d 901, 906-907 [evidence of officer's state of mind irrelevant and thus inadmissible when it does

[2] All statutory references are to the Penal Code unless otherwise specified.

not tend to prove or disprove an issue in the case].) We concluded that there was no dispute or relevancy concerning the course of Sgt. Fleming's investigation since Toscano was already in custody when Sgt. Fleming interviewed the older graffiti tagger. We nonetheless concluded that the statement's admission was harmless under *Watson*, *supra*, 46 Cal.2d 818, noting that jurors were admonished that the testimony was not being offered for the truth of the matter asserted and that substantial other evidence supported Toscano's conviction. We also rejected an undeveloped contention in Toscano's brief that the admission of Sgt. Fleming's testimony violated the confrontation clause, relying on the rule that the confrontation clause is not implicated when an out-of-court statement is introduced for a nonhearsay purpose. (E.g., *People v. Livingston* (2012) 53 Cal.4th 1145, 1163-1164.)

Toscano petitioned for review (No. S231985), which the Supreme Court granted pending its decision in *Sanchez*. In *Sanchez*, the Supreme Court considered whether a defendant's Sixth Amendment right to confrontation is violated under the principles announced in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) when a gang expert is allowed to testify about evidence relied upon in forming his or her opinion. After the Supreme Court decided *Sanchez*, it transferred Toscano's appeal back to this court. Both sides have filed supplemental briefs on whether *Sanchez* affects the disposition we reached in *Toscano I*.

II.
DISCUSSION

A. The *Sanchez* decision.

We begin by discussing the Supreme Court's ruling in *Sanchez*. The defendant, Marcos Arturo Sanchez, was accused of committing various crimes for the benefit of a criminal street gang. (*Sanchez*, *supra*, 63 Cal.4th at p. 671.) To prove that he was a member of a gang, the prosecution offered the testimony of a gang expert, a police officer. (*Id.* at pp. 671-672.) The expert testified generally about gang culture, the gang to which Sanchez was alleged to belong, and the gang's primary activities. (*Id.* at p. 672.) The expert also testified about Sanchez's specific involvement in a gang. (*Ibid.*)

For example, the expert testified about Sanchez's "STEP notice," a police form used to document a person's associations with known gang members. (*Ibid.*) He also testified about other contacts Sanchez had had with the police. (*Id.* at pp. 672-673.) This defendant-specific information was hearsay because the expert had never met Sanchez, and his knowledge of Sanchez's contacts with the police was based on police records. (*Id.* at p. 673.) A jury convicted the defendant as charged. (*Ibid.*)

The Supreme Court in *Sanchez* held that "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the [United States Supreme Court] defines that term." (*Sanchez, supra*, 63 Cal.4th at p. 680, original italics.)

The court explained that the expert's defendant-specific statements about Sanchez's gang membership amounted to inadmissible hearsay under state law. (*Sanchez, supra*, 63 Cal.4th at pp. 670-671.) It rejected the Attorney General's argument that the expert's statements were not admitted for their truth because they were admitted for the purpose of showing what the expert relied upon in forming his opinions. The court stressed that "an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (*Id.* at p. 679, original italics.) "When an expert relies on hearsay to provide case-specific facts, considers the statements as true, and relates them to the jury as a reliable basis for the expert's opinion, it cannot logically be asserted that the hearsay content is not offered for its truth. In such a case, 'the validity of [the expert's] opinion ultimately turn[s] on the truth' . . . of the hearsay statement. If the hearsay that the expert relies on and treats as true is *not* true, an important basis for the opinion is lacking." (*Id.* at pp. 682-683, original italics.) The court explained that the jurors in Sanchez's trial had been instructed under CALCRIM No. 332 [Expert Witness

Testimony] that they must decide whether the information upon which the expert relied was true and accurate. (*Sanchez*, at p. 684.) They thus could not both rely on the out-of-court statements to support the bases for the expert's opinion and rely on a limiting instruction that such testimony should not considered for its truth. (*Ibid.*)

Sanchez went on to explain that the hearsay statements implicated the Sixth Amendment because they were testimonial, and they should have been excluded under *Crawford*. (*Sanchez*, *supra*, 63 Cal. 4th at pp. 694-698.) And it concluded that the error in admitting the statements was not harmless beyond a reasonable doubt (*Chapman*, *supra*, 386 U.S. 18) because the expert's testimony was relied on to prove Sanchez's intent to benefit a criminal street gang. (*Sanchez*, at pp. 698-699.)

B. The admission of Sgt. Fleming's testimony about the graffiti taggers' text conversation violated Toscano's rights under the confrontation clause.

Sanchez reaffirms our original conclusion in *Toscano I* that Sgt. Fleming's testimony about the graffiti taggers' text conversation was inadmissible double hearsay. There was no nonhearsay purpose relevant to an issues in dispute to support the admission of Sgt. Fleming's testimony. (*Sanchez*, *supra*, 63 Cal.4th at p. 675 ["Multiple hearsay may not be admitted unless there is an exception for each level."].)

But *Sanchez* requires us to reexamine our separate conclusion in *Toscano I* that the admission of the testimony did not implicate the confrontation clause because the testimony was admitted for a nonhearsay purpose. True, "[t]he confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted' " (*Sanchez*, *supra*, 63 Cal.4th at p. 674, italics omitted, quoting *Crawford*, *supra*, 541 U.S. at p. 59, fn. 9), and Sgt. Fleming's statement was purportedly admitted for a nonhearsay purpose. But it is incongruent to conclude, on the one hand, that there was no legitimate nonhearsay purpose for Sgt. Fleming's testimony and, on the other hand, that the confrontation clause was not implicated because the testimony was not admitted for its truth. We thus consider whether the admission of

Sgt. Fleming's testimony implicated the confrontation clause even though it was purportedly admitted for a nonhearsay purpose.

Applying the analytical framework summarized in *Sanchez*, we conclude that the admission of Sgt. Fleming's testimony violated Toscano's rights under the confrontation clause. The prosecution was unable to locate the graffiti tagger whose text conversation was summarized by Sgt. Fleming, so it was not possible to subpoena him to testify at trial. The tagger did not testify at the preliminary hearing, either, meaning that Toscano had not previously had a chance to cross-examine him. (*Sanchez, supra*, 63 Cal.4th at p. 680.) And the statements about the text conversation were "testimonial" as defined by *Crawford* and its progeny, because they were "statements about a completed crime, made to an investigating officer by a nontestifying witness, . . . [and not] made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial." (*Sanchez*, at p. 694.)

C. Although the introduction of Sgt. Fleming's testimony about the graffiti taggers' text messages violated Toscano's rights under the confrontation clause, the error was harmless beyond a reasonable doubt.

In *Toscano I*, we concluded that the erroneous admission of Sgt. Fleming's double hearsay testimony was harmless under *Watson*, *supra*, 46 Cal.2d 818, which holds that an error in violation of California law is not prejudicial if there is a "reasonable probability[]" that the outcome would have been the same without the error. (*Id*. at p. 837.) We applied *Watson* in *Toscano I* because we had concluded that the admission of Sgt. Fleming's testimony about the graffiti taggers' text conversation violated state hearsay rules but did not violate the federal confrontation clause. Since we have now concluded that the admission of this testimony violated the confrontation clause, we must examine whether the error is harmless under *Chapman*, *supra*, 386 U.S. at page 24, that is, whether the error was harmless beyond a reasonable doubt. (*Sanchez, supra*, 63 Cal.4th at p. 698 [error under confrontation clause evaluated under *Chapman* standard].)

In *Sanchez*, the court concluded that if the gang expert's case-specific hearsay testimony had been excluded, there would have been insufficient proof that the defendant acted for benefit of a criminal street gang. (*Sanchez, supra,* 63 Cal.4th at pp. 698-699.) Accordingly, its admission was not harmless beyond a reasonable doubt. (*Ibid.*) Here, by contrast, as we emphasized in *Toscano I*, there was abundant evidence supporting Toscano's guilt. In a two-hour interview on the day he was arrested, Toscano acknowledged that he drove to and was present at the crime scene.[3] The victim's cousin selected Toscano from a photographic lineup and identified him as having had a gun, and the cousin identified Toscano again at trial as the person who had a gun and who shot Samier. The victim's two brothers also identified Toscano as having been involved on the night of Samier's murder. Moreover, as respondent notes, the text exchange was mentioned only once at trial, and it was not mentioned during the prosecutor's closing arguments.

We stressed in *Toscano I* that any error in erroneously admitting Sgt. Fleming's testimony was harmless because the trial court promptly admonished the jury that the testimony was not being offered for the truth of the matter asserted. Jurors also were instructed that evidence admitted for a limited purpose could not be considered for any other purpose except the one for which it was admitted. (CALJIC No. 2.09.) And jurors clearly knew that the statement could not be used to prove the truth of the matter asserted, i.e., that Toscano went to the murder scene and was shooting. During jury deliberations, the jurors sent a note to the court asking whether they could use information from the text conversation to determine whether Vilchis was present at the time of the shooting. The court responded that the text conversation "was allowed in only for the purpose of showing you why Sgt. Fleming did what he did in this investigation. It was not admitted

[3] Toscano told police that his co-defendant, Vilchis, shot the victim. At trial, Toscano's statement to police was redacted so that Vilchis was referred to by generic phrases such as "somebody" and "another guy," in order to protect Vilchis's right to confrontation.

for the truth of the conversation." True, as we discussed above and in *Toscano I*, there was no legitimate nonhearsay purpose for Sgt. Fleming's testimony about the text exchange, because Sgt. Fleming's investigatory steps were not relevant to any disputed fact in the case. We have no reason to doubt, however, that the jury followed the trial court's repeated limiting instructions. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152 [court presumes jury followed instructions]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1119 & fn. 53 [limiting instruction minimizes any danger jury might rely on testimony for improper purpose].) This situation is distinguishable from *Sanchez, supra*, 63 Cal.4th at pages 698-699, where accepting the truth of the expert's testimony was essential to prove an element of the gang enhancement. Here, there was sufficient evidence absent Sgt. Fleming's testimony about the text exchange to support Toscano's convictions and the true findings on the enhancements.

In arguing that he was prejudiced under *Chapman*, Toscano focuses almost exclusively on the nature and length of jury deliberations. We recognize that the jurors deliberated over a period of seven days before reaching a verdict. During that time, jurors asked to see all exhibits and readback of various witnesses' testimonies. At one point jurors sent a note to the court stating they were "feeling stuck about a verdict," and at another point they sent a note stating, "We cannot agree on any charges. What do we do next?" Toscano contends that this conclusively demonstrates that the determination of his guilt was a close decision, but we disagree. Some of the length of jury deliberations may be attributed to the fact that jurors asked for readback, which means some of their time was "was not actually deliberating the case, but was [devoted to] listening to the testimonies." (*People v. Walker* (1995) 31 Cal.App.4th 432, 438.) They also requested clarification of various jury instructions, and "we assume that the jury spent time going over their instructions to make sure that they were properly carrying out their duties." (*Ibid.*) And jurors were deliberating charges against two defendants, one for whom they were not able to reach a verdict, making it even more difficult to determine how they

were dividing their time. In light of all these circumstances, we cannot conclude that the length and nature of jury deliberations mandate reversal.

III.
DISPOSITION

The judgment is affirmed.

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Humes, P.J.

We concur:

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Dondero, J.

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Banke, J.